IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 785

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENNESSEE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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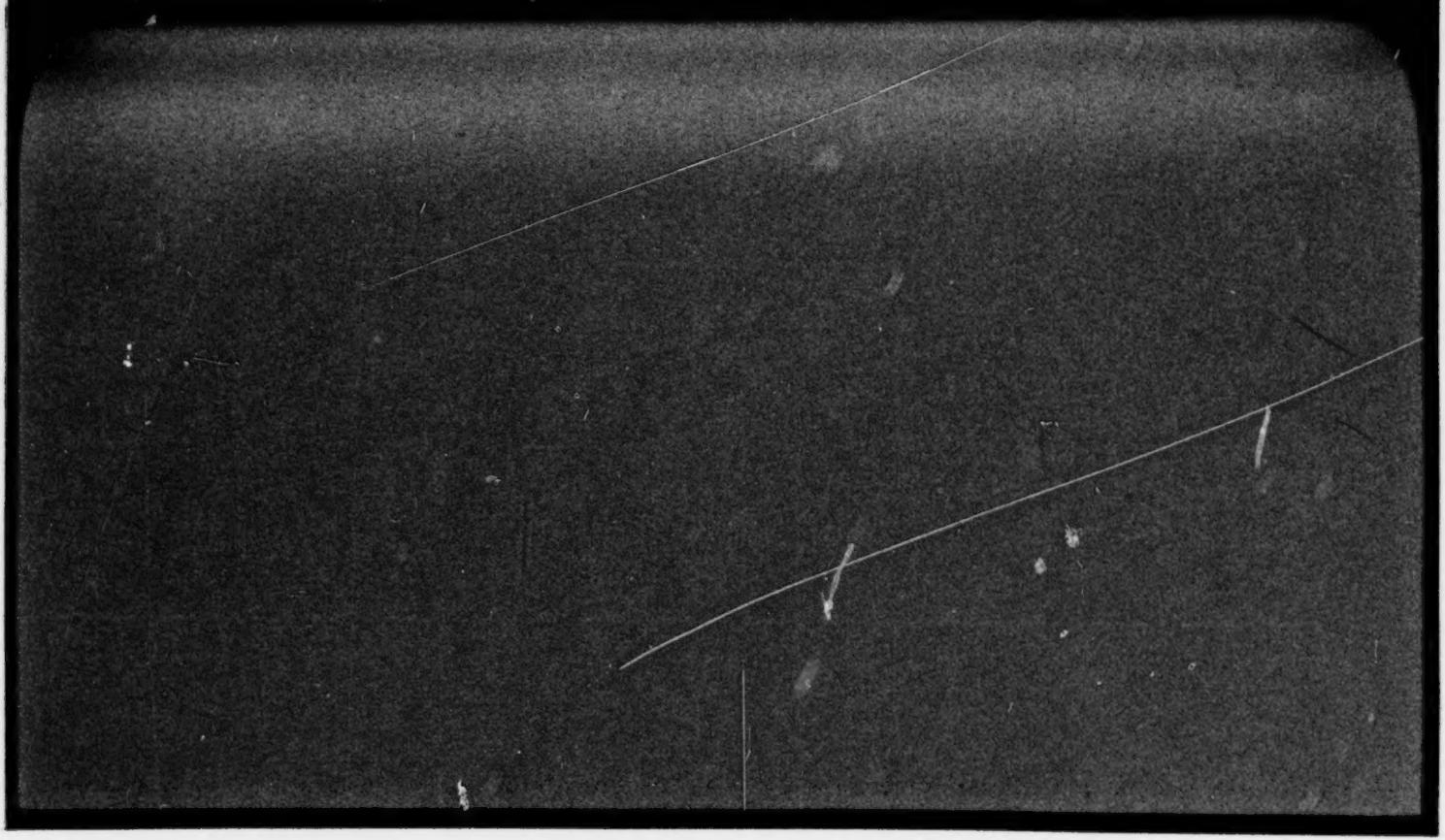

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INTRODUCTION

The respondent, The Natural Gas Utility District of Hawkins County, Tennessee, respectfully urges that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, filed herein on behalf of the National Labor Relations Board, be denied.

The only question presented is whether the decision of the Court of Appeals for the Sixth Circuit below is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *National Labor Relations Board* v. *Randolph Electric Membership Corp.*, 343 F.2d 60 (1965).

It is submitted, that for the reasons set forth hereinafter, there is no conflict between the two decisions, and, accordingly, the petition should be denied.

I.

ANSWER TO "QUESTIONS PRESENTED"

Respondent disagrees with petitioner's statement of the "questions presented."

The question presented here is not "Whether federal law rather than state law governs the determination, under Section 2(2) of the National Labor Relations Act, whether an entity created by a state is a 'political subdivision' thereof and therefore not an 'employer' subject to the Act." Neither is it "Whether the Board properly concluded that the respondent public utility district is not a political subdivision of the State of Tennessee, and whether, under the correct standard of judicial review, the court of appeals should have upheld that determination."

The reasons considered by this Honorable Court in deciding whether or not to grant a petition for a writ of certiorari are set forth in Rule 19 of the rules of this Court.

The only reason for granting such a writ alluded to in the contents of the petition herein is that set forth in Rule 19(1)(b) as follows:

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter."

Thus, the only question here presented is whether the *decision* of the court of appeals below is in conflict with the *decision* of the Fourth Circuit Court of Appeals in the *Randolph* case, supra, *on the same matter.*

As explained hereinafter, the two decisions did not consider "the same matter," and, in any event, the court of appeals below decided this case in accordance with the rule in the *Randolph* case, merely distinguishing the facts here involved.

It is submitted that what petitioner has done in its petition is to take the last several sentences from the full opinion of the court of appeals below and presented the same so as to try to create a conflict in the two decisions.

It is submitted that a conflict in decisions which would be the basis for granting the petition for certiorari does not exist.

II.

ANSWER TO "STATEMENT"

A. The Board's Findings of Fact.

Respondent only partially agrees with this portion of petitioner's brief. On page 3 of its brief, petitioner states:

> "The undisputed facts with respect to the District's status as an employer under the Act are as follows."

The petitioner then sets out a few facts, also some argumentative conclusions, but does not list many other undisputed facts in this record with respect to the District's status as an employer under the Act.

Respondent desires to set out the following additional undisputed facts:

(a) The Natural Gas Utility District of Hawkins County, Tennessee is only one of nearly 270 utility districts in the 95 counties in the State of Tennessee (R. 50).[1]

(b) Any district established under the Utility District Law of 1937 (R. 98-130) is specifically empowered under §6-2608, Tennessee Code Annotated, "to conduct, operate and maintain a system or systems for the furnishing of water, sewer, sewage disposal, natural gas, artificial gas, police, fire protection, garbage collection and garbage disposal, street lighting, parks and recreational facilities, transit facilities, etc., or two or more of such systems—and to carry out such purpose will have the power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain and operate such system or systems within or without the district - - -" (R. 120).

(c) The Utility District Act was passed by the Tennessee legislature to provide a municipal corporate arrangement to furnish certain needed governmental services usually in small towns and rural areas, including, but not limited to, the foregoing listed services; these services were not, and, usually could not be, otherwise provided (R. 51); §6-2607, T.C.A., provides that the district, when formed, "shall be the sole public corporation empowered to furnish such services," so long as the district continues to furnish any of the services which it is herein authorized to furnish (R. 117).

(d) The legislature further provided in §6-2607, T.C.A., that: "From and after the date of the making and filing of such order of incorporation, the district so incorporated shall be 'a municipality' or public corporation in perpetuity - - -."

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1. "R." refers to the joint appendix before the Court of Appeals, a copy of which was filed with the petition.

(e) The county judge who appoints the first commissioners, and who fills vacancies in the event the commissioners cannot agree among themselves, is the top governing official in each county and is himself a publicly elected official (R. 86).

(f) Commissioners serve with only very nominal compensation (R. 126).

(g) So long as a district shall own any system, its property and revenue are exempt from all state, county and municipal taxation, and its bonds are also so exempt, except for estate, inheritance and transfer taxes (R. 113).

(h) By §6-2613, T.C.A., utility districts are specifically exempt from state regulation by the Tennessee Railroad and Public Utilities Commission, even though privately owned public utilities are specifically covered (R. 106).

(i) Further, §6-2615, T.C.A., speaks of the utility district's records as "public records" (R. 107).

(j) Apart from the Utility District Act, §6-318, T.C.A., "Municipal Property and Services," §6-604, T.C.A., in the Municipal Corporations section, and §9-1202, T.C.A., dealing with revenue bond refinancing, refer to and/or characterize a utility district as a "municipality" (R. 36).

(k) Under several federal statutes, including 42 USC 418 (and its counterpart in the Tennessee Code, §8-3811), recognition is given to the fact that a utility district is a governmental entity; an arrangement is provided for voluntary coverage to provide social security benefits to District employees, rather than the mandatory coverage required of non-governmental entities; also interest earned on a utility district's bonds is claimed to be exempt from federal income tax (R. 35).

(l) The district is required to publish its annual statement in a newspaper of general circulation by §6-2617, T.C.A. (R. 108).

(m) The district not only has the power of eminent domain, but can exercise it even against other governmental entities (R. 104).

(n) The state legislature passed this Act to provide a municipal corporate arrangement to furnish certain required services, not feasibly done otherwise (R. 30, 50).

(o) Section 6-2612 of the Utility District Act is a general grant of power and vests in the district *"all the powers necessary and requisite—capable of being delegated by the legislature"* (Emphasis added) (R. 105).

(p) Section 6-2614, T.C.A., as amended, provides that in certain counties, the three commissioners be appointed until the first of the month following the next general election and, at that election, the commissioners be elected for terms of 2, 4, and 6 years by the qualified voters of the district (R. 125).

(q) Vacancies, other than those filled as above, are filled by a vote of the remaining commissioners. If they fail to agree, the fact is certified to the County Judge, who appoints the new commissioner (R. 106, 125). Thus, the district is administered, either by publicly elected officials, or by officials appointed by publicly elected officials of the county.

(r) The general ouster law of Tennessee available for ouster or removal of elected officials applies to the district's commissioners (R. 106; see notes after §6-2614, T.C.A.).

On page 4 of the petition the following are listed among the "undisputed" facts:

> "The powers of the District are vested in and exercised by a three member board of commissioners, *who are not subject to state or county regulation* (Emphasis added). . . . *Neither the state nor the county has any control over the District's employees, and they are not considered state or county employees.*" (Emphasis added).

It is submitted these statements, rather than being undisputed facts, are actually dubious and/or argumentative conclusions when considered in the light of all the truly undisputed facts, including (a) through (r) listed on pages 4 through 6.

Two other observations must be made about these so called "facts":

(a) In the opinion of the Court of Appeals below, reported at 427 F.2d 312, the following appears as footnote 2 on page 314:

> "We disagree with the Board's ruling that because the State does not supervise the District or remove or discipline its commissioners or subordinates, therefore the District is not a political subdivision. We would think that the independence of the District strengthens rather than weakens the proposition that it is a political subdivision."

(b) Section 6-2613, T.C.A., specifically exempts a district from the regulation by the State Railroad and Public Utilities Commission required of a private utility. This is done *because* of a district's governmental nature.

What is significant about this is that the National Labor Relations Board has misunderstood the significance of this exemption throughout this entire proceeding.

It is submitted that both of the foregoing are typical examples of the Board's failure in this case to properly evaluate the "economic realities."

B. The Decisions of the Board and the Court of Appeals.

In its brief on page 6, petitioner, in referring to the initial Board decision, states that despite the fact that the Supreme Court of Tennessee had characterized districts as "arms or instrumentalities" of the state,

> "the Board examined all of the relevant factors and concluded that the District was 'an essentially private venture, with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the act.'"

There is, however, that large number of relevant factors above set out which are in this record and which the Board apparently failed to consider.

Similarly, in reference to the court of appeals' action, on page 7 of its brief, the Board quotes only two paragraphs from the very end of the opinion below (the entire basis for contending a conflict exists arises because of this language). What petitioner does not do is recognize that the court of appeals below had, for several pages, approved the *Randolph* rule, but merely distinguished the facts here.

Accordingly, the following is also quoted from the opinion below reported at 427 F.2d 312 on page 313:

> "Section 6-2607 of the Tennessee Code, under which the Utility District was organized, provided that a District is a 'municipality or public corporation in perpetuity under its corporate name and the same shall be in that name a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes.'
>
> The Supreme Court of Tennessee construed this statute in *First Suburban Water Util. Dist.* v. *McCanless*, 177 Tenn. 128, 146 S.W.2d 948 (1941), and

held that a District organized under it was a municipal corporation and as such was an arm or instrumentality of the state.

The Board declined to follow the decision of Tennessee's highest court, relying instead on *NLRB v. Randolph Elec. Membership Corp.*, 343 F.2d 60 (4th Cir. 1965), which case involved private non-profit utility corporations organized under the laws of North Carolina, which were formed for the exclusive benefit of their own members, did not have the power of eminent domain, were not subject to substantial control or supervision, and did not exercise any portion of the sovereign power of the state. The Board reasoned:

> 'The Utility Districts are not created directly by the State. They are formed by petition of property owners upon a County Judge's determination of the feasibility thereof. Thus, the District is no more a direct creation of the State than such privately-owned public service companies as railroads, and motor carriers, which also require some form of governmental approval, such as a certificate of convenience and necessity.' (App., p. 15 n. 7).

This reasoning is obviously fallacious because privately owned railroads and motor carriers, even though they may have certificates of convenience and necessity, are operated for profit of their owners, whereas the District is owned and operated by the state, and not for the profit of private individuals. The District, unlike railroads and trucking companies, is a public corporation and was not subject to regulation even by the State Public Utilities Commission, and was exempt from all state taxes.

Reliance by the Board on *Randolph* is misplaced. In *Randolph*, unlike our case, there was no holding by the state's highest court that the private utilities were political subdivisions of the state.

In *Randolph* the private utilities were 'formed for the exclusive benefit of its own members.' Here, the District was formed for the benefit of the inhabitants of the community.

In *Randolph*, the utilities involved did not have the power of eminent domain. Here, the District not only has the power of eminent domain but also can exercise it over other governmental entities.

The Commissioners of the District further have the power to subpoena witnesses and to administer oaths. The District's records are 'public records.' The District is required to publish its annual statement in a newspaper of general circulation. Income from its bonds is claimed to be exempt from federal income taxes. Social Security benefits for its employees are voluntary instead of mandatory as the District is considered 'a political subdivision' under 42 U.S.C. §418(5).

In our opinion, it was not necessary that the District be created directly by the state in order to constitute a political subdivision. It is sufficient if the District be created in conformity with state law.

It should be noted that the Act does not require agencies of either federal or state governments to be created directly. As a matter of fact, wholly owned government corporations, including the Federal Reserve Bank and even non-profit hospitals, are specifically exempt.

Under Tennessee law the District is created by petition to the county judge, an elected official, who must find a public convenience and necessity therefor. The county judge appoints the first three commissioners nominated in the petition seeking formation of the District, and fills vacancies in the event the commissioners cannot agree among themselves. In counties having a population of 482,000 or more the commissioners of the Districts are elected at regular

general elections. Although the District involved in the present case did not have the requisite number of residents to necessitate the election of its commissioners, this factor indicates that Tennessee considers the functions of a District to be that of a 'political subdivision' requiring election of commissioners by the electors when the District encompasses a specified population."

Another ground for the decision herein by the Court of Appeals for the Sixth Circuit was that the Board had not here even followed its own prior decisions 427 F.2d 312, 314. *Mobile Steamship Authority, etc.*, 8 NLRB 1297 (1938); *Oxnard Harbor District*, 34 NLRB 1285 (1941); *New Jersey Turnpike Authority*, 33 LRRM 1528 (1954); *New Bedford Wood's Hole, Martha's Vineyard, etc., Steamship Authority*, 127 NLRB 1322 (1960).

Accordingly, it is submitted, petitioner in its brief, as it has done since its earliest decision in this matter, has failed to consider all the facts in the record.

Petitioner has also failed to adequately set forth and explain the opinion below of the Court of Appeals for the Sixth Circuit.

III.

ANSWER TO "REASONS FOR GRANTING THE WRIT"

The decision of the Court of Appeals below is *not* in conflict with the decision of the Court of Appeals for the Fourth Circuit in *National Labor Relations Board* v. *Randolph Electric Membership Corporation*, 343 F.2d 60.

The two decisions do not involve "the same matter." (Rule 19(1)(b) of this Court)

First, the two decisions deal with different entities.

Second, the Court of Appeals' decision below, when considered as a whole, actually followed the *Randolph* case, set out many "economic realities" and based its decision on them, rather than merely blindly and unquestioningly following state law, as the petition infers.

At most, the sentence or two from the opinion below relied upon by petitioner as creating a conflict between this case and *Randolph* is merely an additional reason for the result reached herein.

There is also a third basis for the result reached herein, i.e., "Prior decisions of the Board do not support its holding here". 427 F.2d 312, 314. It is submitted this other reason for the decision below is merely another ground for concluding there is no conflict between the decision in this case and the decision in the *Randolph* case.

A. The Randolph Case and the Case at Bar Deal with Different Entities.

The *Randolph* case dealt with electric membership corporations while the case at bar deals with utility districts. Even a cursory comparison of a North Carolina electric membership corporation with a Tennessee Utility District reveals a different entity.

Coincidentally, the Tennessee statutes also provide for the organization of electric membership corporations in T.C.A. §65-2401 et seq. They are, when formed, very similar to those in the *Randolph* case, being essentially non-profit cooperatives and otherwise similar to privately owned public utilities. The National Labor Relations Board has itself ruled on such a Tennessee electric membership corporation. *NLRB* v. *Gibson County Electric Membership Corp.*, 65 NLRB 760 (1946). (This case was also cited in the *Randolph* case.)

In its brief, on page 8 thereof, petitioner states that the electric membership corporation considered in *Randolph* was created pursuant to a state statute similar to the Tennessee statute (T.C.A. §6-2601, §6-2636) creating the utility districts. It is submitted, there is little resemblance between these two statutes. The North Carolina statute considered in *Randolph* is, however, quite similar to §65-2401, T.C.A., which provides for electric membership cooperatives in Tennessee.

A comparison of the North Carolina Electric Membership Corporation Act, involved in the *Randolph* case, with the act creating the utility districts in Tennessee, involved in the case at bar, reveals significant differences between the two:

(a) Under the Tennessee Utility District Act, the district may furnish one or more types of service (including fire, police, garbage collection, etc.) to all persons in the district and has an exclusive franchise for same in the designated area.

Sections 117-15 and 117-16 of the General Statutes of North Carolina make it clear that only members are entitled to get electric power from the North Carolina Electric Membership Corporation.

Section 117-16 provides as follows:

> "The corporate purpose of each corporation formed hereunder shall be to render service to its members only ---."

Tennessee utility districts, being political subdivisions of the state, must render service to all persons in the district.

The North Carolina electric membership corporations, not being governmental in nature, are required by statute

to render services *only* to their members, and other members of the public are not entitled to get service from it and, in fact, are prohibited from getting service from it.

The case of *Bailey* v. *Carolina Power Company*, 212 N.C. 768, 195 S.E. 64 (1938), held that persons, not members of the electric membership corporation involved in the case, could not maintain an action challenging the validity of the acts of the director of the corporation and, that, the fact that a person is a member of the community, or a resident of the territory, in which an electric membership corporation is authorized to operate, or might be eligible for membership therein, does not entitle him to service by such corporation.

Thus, an electric membership corporation exists solely for the benefit of its members; a Tennessee utility district exists to provide governmental services to citizens in certain areas and is similar to a county or municipality. Further, among the type of services that may be rendered by a utility district are such traditionally governmental services as fire, police, street lighting, garbage collection, etc.

(b) The Tennessee Utility District Act provides that the district not only has the power of eminent domain, but can exercise it even against other governmental entities (R. 104). On the other hand, §117-18(6) of the General Statutes of North Carolina provides that:

> "Subject only to the constitution of the state, a corporation created under the provisions of this article shall have power to - - - apply to the North Carolina Rural Electrification Authority for permission to construct or place any parts of its system or lines in and along any state highway or over any lands which are now, or may be, the property of this state, or any political subdivision thereof. In all questions involving the right of way, *or the right of eminent domain*, the rul-

ings of the North Carolina Electrification Authority shall be final." (Emphasis added).

Thus, the North Carolina electric membership corporations specifically do *not* have the power of eminent domain, while the Tennessee public utility districts not only have this power, but have it against other governmental bodies.

The Board itself in the *New Jersey Turnpike Authority* case, supra, has held the presence of this power (eminent domain) to be a determinative factor in determining an entity to be a governmental subdivision.

(c) Section 6-2607, T.C.A., provides that, once formed, a Tennessee utility district shall be the only public corporation empowered to perform its services within its district. On the other hand, it was held in the case of *Pitt and Greene Electric Membership Corporation* v. *Carolina Power and Light Co.*, 255 N.C. 258, 120 S.E.2d 749 (1961), that an electric membership corporation and a privately owned public utility corporation are free to compete in rural areas, unless restricted by contract.

(d) Section 117-13 of the North Carolina Act provides that each corporation shall have a Board of Directors to be elected annually by the members, and the powers of the corporation shall be vested in said Board. This procedure resembles the stockholders and the directors of a private corporation and is to be contrasted with that followed to select the commissioners of the Tennessee utility district. Said commissioners are appointed by the county judge, the top elected official in most counties, and, in certain counties, it is provided, said utility district commissioners are elected in general elections.

Also of great significance is that profits (similar to dividends) inure to the exclusive benefit solely of the mem-

bers (similar to stockholders) of the Electric Membership Corporation; while the District under §6-2625, T.C.A. (R. 112) may only charge such rates as to remain self supporting, and all users in the entire area are affected by rate changes (the same as rates charged by a county and/or a municipality for governmental services affect all users in the county and/or municipality).

(e) In respondent's answer to the statement of the case, respondent has set out herein, at pages 4 through 6, certain other factors which lead to the conclusion that the utility district is a political subdivision. None of these factors are provided for under the Electric Membership Corporation Act of North Carolina.

Thus, respondent contends that there is no conflict in the two decisions; one holds that *an electric membership corporation* is not a "political subdivision", and the other holds that a *utility district* is a "political subdivision."

B. The Court of Appeals Below Followed the Randolph Case by Taking into Account the Economic Realities.

The Fourth Circuit Court in *Randolph* stated at 343 F.2d 62:

> "- - - *To the extent that it has taken into account economic realities as well as the statutory purposes, the Board's determination is entitled to great respect.*" (Emphasis supplied).

It is, of course, the undenied duty and authority of the National Labor Relations Board to make an initial determination of its own jurisdiction, and having done so, to act as it feels the situation demands.

It is, however, and has been throughout the course of these proceedings, respondent's position that the NLRB

has incorrectly decided it has jurisdiction, and, thereafter, has consistently refused to reconsider the question (R. 18, 19-26).

The *Randolph* case certainly does not stand for the proposition that once the Board has determined its own jurisdiction, the courts do not have the right to challenge it. This position is in conflict with basic horn book law. Jurisdiction can be raised at any time in a proceeding. In *Cardillo* v. *Liberty Mutual Company*, 330 U.S. 469, 473 (1947), it was stated:

> "But in reviewing an administrative order, it is ordinarily preferable where the issue is raised and where the record permits an adjudication, for a federal court first to satisfy itself that the administrative agency or officer had jurisdiction over the matter in dispute."

It is respondent's position that the Board failed to correctly analyze the "economic realities" and/or evaluate the total picture, and, consequently, failed to correctly apply the "political subdivision" exemption of §2(2) of the National Labor Relations Act, which respondent asserts is clearly dictated in this case, and which the Board's regional office held applicable in Case No. 26-RC-2972, involving another Tennessee utility district with identical powers and created under the same Act (R. 68, 58 and 60).

Respondent contends that the Court of Appeals below followed the *Randolph* rule. Rather than holding that state law, rather than Federal law, governs, without considering other factors, that court took into account both the "economic realities and the statutory purposes." Thus, the Court below followed the rule of the *Randolph* case but distinguished the facts here.

The actual holding of the *Randolph* case with reference to the effect of state law in interpretation of the Wagner Act is as follows:

> "The fact that North Carolina sees fit to characterize such corporations as 'political subdivisions' - - - is not *decisive* of the question before us, since their relation to the state and their actual methods of operation do not fit the label given them." (Emphasis supplied).

The Court of Appeals below held, as far as utility districts are concerned, that their actual methods of operation and their relation to the state *do* fit the label that the state has given them.

In other words, the *Randolph* case held that where the actual methods of operation and the relation of the body do *not* fit the label given them by the state, *then* the fact that the state characterizes it as a "political subdivision" would not be decisive of the question.

At the end of its opinion herein, the Court of Appeals below did say:

> "- - - the decision of the Supreme Court of Tennessee was of controlling importance on the question whether the District was a political subdivision of the state. In our opinion, it was binding on the Board."

Obviously, if the Court of Appeals below had only stated the foregoing and had not, before this, set out in detail the various economic realities on which it based its decision, there might be a conflict *if the same type of entity were involved*. But, having so set out at length the various economic realities, the last two sentences in the opinion are, at most, only another basis for the Court's decision.

Incidentally, still another ground for the result reached below is, as the Court of Appeals stated: "Prior decisions of the Board do not support its decision here", citing various Board decisions. In *Mobile Steamship Authority, etc.*, supra, *Oxnard Harbor District*, supra, and *New Jersey Turnpike Authority*, supra, the Board apparently held the

entities exempt without going into the question of whether state law is controlling in what constitutes a political subdivision. In *New Bedford, Wood's Hole, Martha's Vineyard, etc., Steamship Authority*, supra, the Board, citing *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223 (1940), held state law controlling on what constitutes a political subdivision. Thus, it is submitted, this further demonstrates there is no conflict between the result herein and *Randolph*, because the Court below, in part, rested its decision on the ground that the Board had not followed its own prior decisions.[2]

Most certainly, nowhere in *Randolph*, or in *NLRB* v. *Hearst Publications, Inc.*, 332 U.S. 102 (1944), cited by petitioner in its brief and relied upon by the Court in *Randolph*, is it stated that state law is not to be considered. All that the *Hearst* case said was that state law would not "exclusively" control. 322 U.S. 102 at page 125.

It is extremely important to note that *Randolph* chiefly relied upon *Hearst*.

Thus, the "conflict" boils down to the language, in the last two sentences of the full opinion below, where the Court stated that the decision of the Supreme Court of Tennessee that the District is a political subdivision is "binding on the Board" and the language in *Randolph*, from the *Hearst* case, that state law does not "exclusively" control. Is this a conflict in decisions on the same matter?

It is submitted that both courts followed the rule of first examining and evaluating all the underlying facts and economic realities in deciding that the entity is, or is not,

2. To this should be added the Regional Director of Region 26 of the NLRB's ruling in Case No. 26-RC-2972 that the West Tennessee Public Utility District of Weakley, Carroll and Benton Counties, Tennessee was not an "employer" within the meaning of §2(2) of the Act (R. 58).

a political subdivision; the Court below, after so doing, held the respondent exempt. When this decision is considered as a whole, no real conflict exists, even if the same type of entity were involved—which, it is also submitted, as herein set out, is not the case.

The Court of Appeals below also followed *Randolph* and the case of *NLRB* v. *Hearst Publications*, supra, cited by petitioner in its brief, by looking to the intent of Congress in enacting the National Labor Relations Act. *Randolph* required "taking into account - - - the statutory purposes." The following language taken from the decision of the Court of Appeals below in the case at bar is pertinent:

> "It was the clear intention of Congress not to make amenable to the National Labor Relations Act employees of either federal or state governments. The effect of the order of the Board in the present case may be to extend its jurisdiction over public employees, in nearly 270 Utility Districts in Tennessee, which Districts perform a wide variety of public functions."

CONCLUSION

As stated above, petitioner's contention that there is a conflict of decisions in the courts of appeal is not valid.

Different entities were examined in the two decisions.

Further, in each case, the NLRB or a federal court of appeals, as the court below in this case and in *Randolph* did, must, in determining jurisdiction, consider the economic realities, including giving due consideration to state law, as well as the statutory purposes, in arriving at its decision as to whether an entity is, or is not, a "political subdivision." The particular facts and economic realities of each case must control.

The petition for a writ of certiorari should not be granted.

Respectfully submitted,

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